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No. 98-1137

In the

Supreme Court of the United States

October Term, 1998

THE COUNTY COUNCIL OF VOLUSIA COUNTY, FLORIDA, a political subdivision of the State of Florida,
Petitioner,

v.

LOGGERHEAD TURTLE (Caretta caretta); GREEN TURTLE (Chelonia mydas); SHIRLEY REYNOLDS, and RITA ALEXANDER,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does the Endangered Species Act impose affirmative obligations on county governments to enact laws that will prevent others from violating the Act?

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37,[1] Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Petitioner, County Council of Volusia County, Florida. Written consent for amicus participation in this case was requested but has been withheld.

IDENTITY AND INTEREST OF AMICUS CURIAE

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in the litigation of matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only when the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

The United States Court of Appeals for the Eleventh Circuit ruled that a party seeking to enforce the Endangered Species Act has standing to claim that a county government "takes" protected species simply by failing to exercise its independent regulatory power for their protection. One consequence of this holding is that it suggests that the Endangered Species Act imposes upon municipal governments an affirmative duty to regulate. PLF believes that the Constitution limits the power of the federal government to interfere with the legislative functions of state and local governments. Several decisions of this Court affirm that proposition. *See New York v. United States*, 505 U.S. 144, 157 (1992); *Printz v. United States*, 521 U.S. 98, 117 S. Ct. 2365, 2384 (1997). PLF believes that the erroneous decision by the Eleventh Circuit, if it stands, will result in increasing federal

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[1] Pursuant to Supreme Court Rule 37.6, amicus Pacific Legal Foundation states that no counsel for a party to this action authored any portion of this brief and that no person or entity, other than amicus, made a monetary contribution to the preparation or submission of this brief.

interference in the affairs of state and municipal governments. This would strike at the foundation of our system of federalism.

Attorneys for PLF have participated in numerous cases before this Court and other courts, both as amicus and in representing private persons. For example, we represented the Nollans in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and we represented Mrs. Suitum in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997). We have also participated as amicus in several cases involving Tenth Amendment issues. See, for example, *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264 (1981), and *Printz v. United States*, 521 U.S. 98 (1997).

PLF firmly believes that a review of this matter is necessary in order that the issues involved may be properly considered. If the decision of the Eleventh Circuit is allowed to stand, the opinion below will constitute a substantial diminution of the independence of state and local governments from federal control.

For the foregoing reasons, Pacific Legal Foundation requests that this motion for leave to file the annexed brief amicus curiae be granted.

DATED: February, 1999.

Respectfully submitted,

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TABLE OF CONTENTS

Page

QUESTION PRESENTED i

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER 1

IDENTITY AND INTEREST OF AMICUS CURIAE 1

TABLE OF AUTHORITIES iv

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. THE FEDERAL GOVERNMENT'S PRACTICE OF REQUIRING STATE ENFORCEMENT OF FEDERAL POLICY DECISIONS IS A GROWING CONSTITUTIONAL PROBLEM THAT SHOULD BE ADDRESSED NOW 2

II. THIS CASE RAISES THE IMPORTANT QUESTION OF WHETHER THE STANDING DOCTRINE PERMITS A PLAINTIFF TO CLAIM THAT A MUNICIPAL GOVERNMENT "TAKES" ENDANGERED SPECIES BY DOING NOTHING 5

A. Volusia County Did Not Affirmatively Cause Harm but Merely Failed to Regulate 6

B. Can a Failure to Regulate Be a Legal Cause of Harm in the Absence of a Duty to Act? 7

III. THIS CASE ALSO RAISES THE IMPORTANT QUESTION OF WHETHER THE ESA CAN CONSTITUTIONALLY IMPOSE UPON MUNICIPAL GOVERNMENTS A DUTY TO REGULATE FOR THE PROTECTION OF ENDANGERED SPECIES 9

TABLE OF CONTENTS—Continued

Page

A. The Tenth Amendment Prohibits the Federal Government from Imposing upon the States or Their Subdivisions a Duty to Administer or Enforce Federal Regulatory Programs 10

B. Settled Principles of Statutory Construction Require Federal Courts to Interpret Federal Statutes So as to Avoid Constitutional Problems 13

CONCLUSION 15

TABLE OF AUTHORITIES

Page

Cases

Allen v. Wright, 468 U.S. 737 (1984) 5

Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995) (Scalia, J., dissenting) 8, 14

Chiarella v. United States, 445 U.S. 222 (1980) 8

Communications Workers of America v. Beck, 487 U.S. 735 (1988) 13

Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978) 6

LaFountain v. Webb Industries Corporation, 951 F.2d 544 (3d Cir. 1991) 7

Loggerhead Turtle v. County Council of Volusia County, 148 F.3d 1231 (11th Cir. 1998) 4, 6, 12

Maruho Company, Ltd. v. Miles, Inc., 13 F.3d 6 (1st Cir. 1993) 7

New York v. United States, 505 U.S. 144 (1992) 3, 10-11

Printz v. United States, 521 U.S. 98, 117 S. Ct. 2365 (1997) 3, 10-11

Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976) 5

Strahan v. Coxe, 127 F.3d 155 (1997) 1, 3-4, 9

United States v. Iron Mountain Mines, Inc., 987 F. Supp. 1263 (E.D. Cal. 1997) 7-8

United States v. Town of Plymouth, Massachusetts, 6 F. Supp. 2d 81 (1st Cir. 1998) 1, 3-4

TABLE OF AUTHORITIES—Continued

Page

Warth v. Seldin, 422 U.S. 490 (1975) 5

Statutes and Regulation

16 U.S.C. § 1531 9

§ 1532(12) 9

§ 1532(19) 9, 14

§ 1535 9-10

§ 1538 9

§ 1538(a)(1)(B) 9

50 C.F.R. § 17.3 14

United States Constitution

Tenth Amendment 12-13

Miscellaneous

William L. Prosser, *Handbook of the Law of Torts*, § 56 (1971) 7

STATEMENT OF THE CASE

Amicus adopts Petitioner's Statement of the Case.

SUMMARY OF ARGUMENT

Volusia County, Florida (County), has not made it illegal to turn on a porch light in Daytona Beach. According to the respondents, this failure to regulate constitutes a violation of the Endangered Species Act (ESA).

Respondents urge that the use of artificial beachfront lighting during hatching season may injure or "take" turtles in violation of the ESA. It is not the County's lights that cause this problem, however. It is rather the lights of individual car drivers, homeowners, and communities near the beach. Instead of bringing an action against each individual that has allegedly violated the ESA, Respondents find it more efficient to simply sue the County for not regulating the behavior of those individuals.

The precise issue before the Court is whether the ESA imposes a duty on states and municipalities to exercise their lawmaking power in a specified manner. The more fundamental question implicated by respondents' case, however, is whether Congress has the power to require states, cities, and counties to enact specific laws. This is not an isolated question. Already, similar suits have been filed against Massachusetts state officials, and the Town of Plymouth, Massachusetts. *See Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997), *cert denied*, 118 S. Ct. 1830 (1998); *United States v. Town of Plymouth, Massachusetts*, 6 F. Supp. 2d 81 (D. Mass 1998). The capacity for mischief authorized by the decision of the court below is nearly unbounded. It is not enough that the ESA involves federal agents in local land use planning. With the decision below, the ESA now also permits federal agents to co-opt the lawmaking and policing functions of local governments to serve federal ends.

If the ESA does not impose a duty to regulate, the County's failure to regulate cannot be a legal cause of the Respondents' harm, and their harm is not "fairly traceable" to the Petitioner. The "fairly traceable" element of Article III standing looks at the causal connection between the plaintiff's harm and the defendant's conduct. It is a fundamental principle of causation, recognized by this Court, that a failure to act is not a legal cause of harm unless there is a duty to act. If the ESA does not impose a duty to regulate, the Respondents would lack standing to pursue this claim in federal court.

ARGUMENT

I

THE FEDERAL GOVERNMENT'S PRACTICE OF REQUIRING STATE ENFORCEMENT OF FEDERAL POLICY DECISIONS IS A GROWING CONSTITUTIONAL PROBLEM THAT SHOULD BE ADDRESSED NOW

In the decision below, the United States Court of Appeals for the Eleventh Circuit found implicitly that the ESA imposes upon municipal governments a duty to enact all regulations that are necessary to prevent third parties from harming or harassing endangered species. In effect, this mandate would require state and local governments to anticipate all the possible ways that endangered species might be harmed by third parties, and it would compel these governments to enact regulations factually sufficient to prevent that harm. If, in good faith, a county government enacts an ordinance that is intended to protect endangered species, as Volusia County did here, and in fact the ordinance is not sufficiently strict to actually prevent harm, such a county would be subject to liability for a "take" under the ESA.

The Eleventh Circuit's interpretation of the ESA in this case is typical of a growing trend that involves courts imposing upon state and local governments affirmative duties to use their regulatory powers to serve federal policy objectives. This Court

has already seen at least one case that presented these problems. *See Strahan v. Coxe*, 127 F.3d 155.[2] In *Strahan v. Coxe*, the First Circuit held that a governmental entity can "take" protected species merely by permitting the use of gillnets. The court thus required the state to stop allowing the use of gillnets.

The case at bar presents an even more direct interference with the conduct of state officers. Whereas in *Strahan v. Coxe* it was arguable that the state had actually done something to at least encourage a "take" by issuing permits to those who wished to use gillnets, in this case there can be no such claim. In this case, Petitioner has done nothing more than fail to regulate. If there is a clear place to draw a line beyond which the power of the ESA may not extend, that place is presented in this case. This Court has provided a long history of substantial authority prohibiting federal invasion of state and local power. *See, e.g. New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 98, 117 S. Ct. 2365 (1997). Drawing the line here would not be extraordinary.

Strahan v. Coxe and the Eleventh Circuit's decision in this case stand for the proposition that the ESA requires state and local governments to use their regulatory powers to enforce the strictures of the ESA. In other cases, federal courts have shown how intrusive this mandate can become. For example, in *United States v. Town of Plymouth, Massachusetts*, the United States Fish and Wildlife Service sought a preliminary injunction to prohibit the town from allowing off-road vehicles to drive on the beach where they threaten a population of protected birds, piping plovers. Without noting any constitutional problems, the district court suggested that the town's "failure to act quickly and

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[2] Although this Court did not ultimately grant review in *Strahan v. Coxe*, it did express some interest in these issues by inviting the Solicitor General to file a brief expressing the views of the United States. *See Coates v. Strahan*, 118 S. Ct. 1830 (1998). The Solicitor General urged this Court to vacate the First Circuit's opinion.

decisively" caused the taking of at least one plover chick. *Plymouth*, 6 F. Supp. 2d at 91.

In issuing a preliminary injunction, the court not only required the Town of Plymouth to forbid beach access to off-road vehicles, but it also turned the municipality into an appendage of the United States Fish and Wildlife Service. The court's order required the town to "conduct monitoring of piping plovers and their nests by a qualified biologist," which monitoring "shall be conducted not less than three times per week." *Id.* at 92. In some cases, the town is obligated to identify each piping plover nest and monitor each nest "at least twice per day, at dawn and dusk." *Id.* at 93. Municipal employees are required to "maintain and regularly update a log of the numbers and locations of unfledged plover chicks on each beach." *Id.* The town must provide reports to the Fish and Wildlife Service on a bi-weekly basis, including information about every nest, egg, and bird. *Id.* at 93-94.

If other courts follow the lead set by *United States v. Town of Plymouth*, *Strahan v. Coxe*, and *Loggerhead Turtle v. County Council of Volusia County*, we can reasonably expect the Fish and Wildlife Service and the National Marine Fisheries Service to begin directing the regulatory functions of state and local governments nationwide.

In light of the momentum that this type of federal invasion of state sovereignty has gained, intervention by this Court is desperately needed. Interference with state and local government, in the name of protecting species, is only likely to increase. This case presents a good place to draw the line.

Review by this Court is necessary to settle this important question.

II

THIS CASE RAISES THE IMPORTANT QUESTION OF WHETHER THE STANDING DOCTRINE PERMITS A PLAINTIFF TO CLAIM THAT A MUNICIPAL GOVERNMENT "TAKES" ENDANGERED SPECIES BY DOING NOTHING

The "fairly traceable" element of standing requires that there be a causal connection between the injury and the conduct complained of, such that the injury is "fairly . . . trace[able] to the challenged action of the defendant." *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41 (1976). Where the injury to plaintiffs is "highly indirect," and "results from the independent action of some third party not before the court," it is "substantially more difficult to meet the minimum requirement of Article III." *Allen v. Wright*, 468 U.S. 737, 757-58 (1984) (quoting *Simon*, 426 U.S. at 42; *Warth v. Seldin*, 422 U.S. 490, 505 (1975)). In exploring this causal connection, courts are not limited to examining bare questions of causation in the abstract but, rather, standing inquiry "often turns on the nature and source of the claim asserted." *Warth v. Seldin*, 422 U.S. at 500.

In this case, Respondents have alleged that Volusia County has "taken" turtles under the ESA by failing to regulate. It is axiomatic that a failure to act cannot be a legal cause of harm unless there is a duty to act. This Court must address whether the ESA does, and constitutionally can, impose upon Volusia County a duty to prevent the "take" of protected species by third parties. If Volusia County has no duty to act under the ESA, its failure to regulate is not a legal cause of harm, and the Respondents' harm is not "fairly traceable" to the acts of Volusia County. Respondents then have no standing.

A. Volusia County Did Not Affirmatively Cause Harm but Merely Failed to Regulate

Before considering whether the ESA allows the possibility of a municipal "take" through nonfeasance, it is essential to examine exactly what Volusia County is alleged to have done.

Volusia County actually passed an ordinance that was intended to protect sea turtles by limiting beachfront lighting. Respondents complain that, by exempting Daytona Beach and Daytona Beach Shores from the ordinance, the County has caused the take of turtles. *Loggerhead Turtle v. County Council of Volusia County*, 148 F.3d 1231, 1249 (11th Cir. 1998). Respondents further claim that the Minimum Environmental Standards for Sea Turtle Protection, even where they apply, are "too lax to prevent takes." *Id.*

Thus, Respondents are not concerned with what Volusia County did but, rather, what it failed to do. By failing to absolutely forbid all beachfront lighting that harms turtles, Respondents claim, the County has "taken" turtles, even though the independent acts of third-party light owners directly caused the harm.

This Court has never found causation in such cases but, rather, has explained

> that a State is responsible for the . . . act of a private party when the State, by its law, has compelled the act. This Court, however, has never held that a State's mere acquiescence in a private action converts that action into that of the State.

Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 164 (1978) (internal quotation marks and citations omitted). If Volusia County had actually compelled the various communities and private landowners within its boundaries to utilize beachfront lighting in a way that would harm protected sea turtles, it might fairly be said that the County had caused the turtle's harm. But

Volusia County's "mere acquiescence" in the decisions of private landowners and independent communities to operate beachfront lighting does not convert that conduct into County action. No affirmative conduct on the part of Volusia County has harmed sea turtles. At most, Volusia County has merely failed to regulate.

B. Can a Failure to Regulate Be a Legal Cause of Harm in the Absence of a Duty to Act?

The law has long recognized the principle that a failure to act cannot be a legal cause of harm unless there is a duty to act. Prosser has explained that, for a court to find liability for nonfeasance, "it is necessary to find some definite relation between the parties, of such a character that social policy justifies the imposition of a duty to act." William L. Prosser, *Handbook of the Law of Torts* § 56, p. 339 (1971). This principle has been recognized by several federal courts. *See, e.g., Maruho Company, Ltd. v. Miles, Inc.*, 13 F.3d 6, 10 (1st Cir. 1993) (explaining that "[t]o predicate tort liability upon a negligent omission, one must find a special relationship, between defendant and plaintiff, that imposes a duty upon the defendant to take positive steps to protect the plaintiff"); *LaFountain v. Webb Industries Corporation*, 951 F.2d 544, 548 (3d Cir. 1991) (noting that nonaction creates liability only where there is a duty to act).

The Eastern District of California has explained this principle in the context of river contamination under Comprehensive Environmental Response Compensation, and Liability Act (CERCLA):

> It could always be said to be "foreseeable" that laws . . . retarding industrial activity will . . . decrease pollution in the aggregate, and that any particular release . . . might have been prevented or reduced with the passage of [a law]. However, that cannot be the threshold for legal or proximate cause. If it were,

> the United States would be one of the "causes" of contamination in every CERCLA action because the federal government always could have enacted legislation regulating industrial activity.

United States v. Iron Mountain Mines, Inc., 987 F. Supp. 1263, 1275 (E.D. Cal. 1997). In the same way, if a failure to regulate could be the legal cause of "take" under the ESA, local governments would always be causes of "take" sufficient to support standing. Even this Court has acknowledged that liability for an omission is actionable only where there is a duty to affirmatively act. *See Chiarella v. United States*, 445 U.S. 222, 228 (1980) (explaining that "one who fails to disclose material information prior to the consummation of a transaction commits fraud only when he is under a duty to do so").

Does the ESA require the application of a different principle? Before the decision of the Eleventh Circuit, the ESA had never been interpreted to suggest that a failure to regulate can cause a "take" of species in the absence of a particular duty to act. In fact, the United States itself, in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, argued that an omission can constitute a "take" "only if there is a legal duty to act." *Sweet Home*, 515 U.S. 687, 716 (1995) (Scalia, J., dissenting) (discussing the Secretary of the Interior's position on omissions). No legal authority suggests that a different principle should be applied here.

This important question of federal law has far reaching implications and should be resolved by this Court.

III

THIS CASE ALSO RAISES THE IMPORTANT QUESTION OF WHETHER THE ESA CAN CONSTITUTIONALLY IMPOSE UPON MUNICIPAL GOVERNMENTS A DUTY TO REGULATE FOR THE PROTECTION OF ENDANGERED SPECIES

"The Endangered Species Act was enacted with the purpose of conserving endangered and threatened species and the ecosystems on which they depend." *Strahan v. Coxe*, 127 F.3d at 161; *see* 16 U.S.C. § 1531. Among other provisions, "the ESA prohibits any person from 'tak[ing] any [endangered] species within the United States or the territorial sea of the United States." *Strahan*, 127 F.3d at 161-62; 16 U.S.C. § 1538(a)(1)(B). The ESA makes clear that its provisions apply to municipal governments, just as they apply to private citizens. 16 U.S.C. § 1532(12) (defining "person" to include "any . . . municipality, or political subdivision of a State"). But does the ESA require municipal governments to enact regulations to enforce its provisions?

A plain reading of the ESA does not reveal any language directing municipal governments to regulate in favor of endangered species. Although Section 9 of the ESA lists all the acts that are unlawful under the ESA, it does not expressly claim that municipal governments can "take" endangered species by failing to regulate. 16 U.S.C. § 1538. The word "take" itself, which is defined to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct," implies affirmative conduct and does not suggest that a failure to regulate might violate the Act. 16 U.S.C. § 1532(19).

Similarly, Section 6 of the ESA authorizes the Secretary of the Interior to cooperate with states in conserving endangered species. 16 U.S.C. § 1535. But no provision of Section 6 obligates municipal governments to affirmatively prohibit any

act on the part of third parties that might "take" endangered species. *Id.* No other provision of the ESA, nor its legislative or regulatory history, purports to require municipalities to use their regulatory power to protect endangered species.

Implicit in the decision of the Eleventh Circuit, however, is the proposition that the "take" provision itself imposes upon municipalities an affirmative duty to regulate. Because this proposition is opposed both by the Constitution and by established principles of statutory construction, it requires resolution by this Court.

A. The Tenth Amendment Prohibits the Federal Government from Imposing upon the States or Their Subdivisions a Duty to Administer or Enforce Federal Regulatory Programs

This Court has explained that, under the Tenth Amendment, "the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States." *New York v. United States*, 505 U.S. at 157. Among those limits, "[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Printz v. United States*, 117 S. Ct. at 2384.

The sole challenge in *New York v. United States* was the *method* by which Congress chose to regulate: forcing states to take title to radioactive waste, or alternatively, requiring them to legislate in a certain manner. *New York*, 505 U.S. at 160. In invalidating the Low-Level Radioactive Waste Policy Act, this Court explained that Congress could validly direct states to regulate according to federal standards either by making the grant of federal funds dependent upon state compliance with federal mandates, or by offering the states the choice of regulating according to federal standards or having state law preempted by a federal program administered by the federal

government. *Id.* at 167. But each of these valid means consists only of "encouraging a State to conform to federal policy choices," while allowing "the residents of the State [to] retain the ultimate decision as to whether or not the State will comply." *Id.* at 168. The "take title" provisions at issue in *New York* were unconstitutional because they did not employ either of these permissible means.

As interpreted by the Eleventh Circuit in this case, municipal governments are not offered federal funds, nor are they offered a choice between following federal standards or direct federal regulation. Rather, the Eleventh Circuit's interpretation of the ESA amounts to a simple mandate directing municipal governments to exercise their formerly independent regulatory power to serve federal ends. Imposing this type of duty is contrary to the principles of *New York*.

In *Printz v. United States,* this Court found that Congress could not force local officials to carry out federal duties:

> We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.

Printz v. United States, 117 S. Ct., at 2384.

The Eleventh Circuit's interpretation of the ESA provides a private right of action to individual persons to employ federal law "to compel the States to enact or enforce a federal regulatory program." Interpreted this way, the ESA attempts to circumvent the constitutional protection that prevents Congress from forcing states to act to implement federal programs. For this reason, the Eleventh Circuit's interpretation of the ESA is contrary to *Printz*.

The decision of the Eleventh Circuit, and the rationale upon which it is based, deprives the residents of Volusia County of the ultimate decision as to whether their County will affirmatively enforce the Endangered Species Act. In a case like this one, where the court decides Volusia County has failed to actually prevent harm by third parties to protected species despite its efforts to do so, the Eleventh Circuit sees no constitutional problem with fashioning a remedy "that would adequately bring about Volusia County's compliance with the ESA." *Loggerhead*, 148 F.3 at 1254. In other words, if Volusia County chooses not to exercise its regulatory power to enforce the ESA, or if the County chooses to regulate but is not entirely effective in preventing harm to protected species, the Eleventh Circuit is prepared to require the County to regulate until harm by third parties is actually prevented.

This Court's Tenth Amendment jurisprudence prohibits the federal government from meddling with the independent legislative functions of the political subdivisions of sovereign states. To the extent federal courts interpret the ESA to compel regulation on behalf of local governments, they shift political accountability for enforcement activities off of federal officers and on to local officials.

Because it would force municipal governments to exercise their regulatory powers to serve federal policy choices, the Eleventh Circuit's interpretation of the ESA runs afoul of this Court's Tenth Amendment jurisprudence.[3] Accordingly, this

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[3] Petitioners have also offered this Court a substantial discussion of how the Tenth Amendment limits the power of the ESA to compel the regulatory action of Volusia County. Even though the Eleventh Circuit stated that Volusia County has not raised Tenth Amendment or federalism concerns, these issues are appropriately raised before this Court for two reasons. First, the extent of Congress' power to impose upon municipal governments a duty to regulate is integral to the question of whether Respondents' harm is "fairly traceable" to

(continued...)

Court should decide whether the ESA can constitutionally impose upon municipal governments a duty to regulate.

B. Settled Principles of Statutory Construction Require Federal Courts to Interpret Federal Statutes So as to Avoid Constitutional Problems

This Court has explained that

> federal statutes are to be construed so as to avoid serious doubts as to their constitutionality, and that when faced with such doubts the Court will first determine whether it is fairly possible to interpret the statute in a manner that renders it constitutionally valid.

Communications Workers of America v. Beck, 487 U.S. 735, 762 (1988).

As an initial matter, it is clear that the Eleventh Circuit's interpretation of the ESA raises serious constitutional problems. If, as the Eleventh Circuit and Respondents suggest, municipal governments can "take" protected species merely by doing nothing, the ESA effectively imposes upon municipalities a duty to implement and enforce its provisions. As noted above, and as discussed in great detail by Petitioner, imposing such a duty would interfere with the sovereign power of the states in violation of the Tenth Amendment.

No language in the Endangered Species Act expressly imposes upon municipalities an affirmative duty to regulate in favor of protected species. The constitutional problem arises

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[3](...continued)
Volusia County. If Volusia County has no duty to implement the ESA, its failure to act cannot be a legal cause of Respondents' harm. Second, it is the decision of the Eleventh Circuit itself that has purported to find in the ESA a federal power to compel municipal regulation. Thus, the Tenth Amendment is implicated by the opinion of the court of appeals. Therefore, review is appropriate here.

only from the Eleventh Circuit's conclusion that, under Section 9 of the ESA, a municipality may "take" endangered species by failing to regulate for their benefit.

A different reading of the ESA is possible. The word "take" is defined to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). This definition implies that only affirmative conduct, and not something as passive as a failure to regulate, can violate the Act. The federal regulations do define "harass" to include "an intentional or *negligent act or omission* which creates the likelihood of injury to wildlife." 50 C.F.R. § 17.3 (emphasis added). Likewise, the definition of "harm," which means "an act which actually kills or injures wildlife," has been interpreted by the Secretary of the Interior to include omissions. *Id.*; *see Sweet Home*, 515 U.S. at 716 (Scalia, J., dissenting) (discussing the Secretary of the Interior's position on omissions). However, the United States has previously informed this Court that "an 'omission' constitutes an 'act' . . . only if there is a legal duty to act." *Sweet Home*, 515 U.S. at 716 (Scalia, J., dissenting). These definitions, and the interpretation of the United States, seem to refer to legal duties that might exist outside of the ESA itself, or at least outside of the "take" provision. After all, if the ESA itself imposed an affirmative duty to act on the part of municipal governments, a failure to act would constitute a "take" in all circumstances, as long as protected species were harmed. If such were the case, it would make little sense to refer in the definitions to negligence or other duties.

The search for an affirmative duty to regulate in the ESA is a strained one. No other court has found any text in the ESA that imposes upon municipal governments a duty to regulate to protect endangered species. Likewise, no other court has justified the existence of such a duty by deduction or inference. Neither respondents nor the Eleventh Circuit has suggested any statutory source for such a duty.

Nevertheless, the Eleventh Circuit interprets the ESA to impose an affirmative duty on local governments to enact regulations to enforce the ESA. The failure to enact regulations then becomes an omission that, under the federal regulations, constitutes a "take" of any affected endangered species. This position casts aside a reasonable alternative interpretation that would avoid a serious constitutional issue by not reading into the act an affirmative duty of state and local governments to assume the burdens and obligations of enforcing this federal program.

CONCLUSION

Under the "fairly traceable" element of Article III standing, a plaintiff can pursue her case in federal court only if there is a meaningful causal relationship between the plaintiff's harm and the defendant's conduct. It is a fundamental principle of causation that a failure to act is not a legal cause of harm unless there is a duty to act. In this case, Respondents allege that their harm is caused by Volusia County's failure to effectively regulate. Can this failure to act be a legal cause of Respondents' harm in the absence of a duty to regulate? Does the Endangered Species Act impose upon municipalities a duty to regulate to serve its purposes? Does the Tenth Amendment prohibit the ESA from imposing such a duty? It is essential that this Court answer these questions.

The Eleventh Circuit's interpretation diminishes the independence of municipalities and transform them into appendages of the United States Fish and Wildlife Service. Such an erosion of state independence threatens the principles of federalism that lie at the foundation of our most basic freedoms.

For these reasons, this Court should grant the writ of certiorari.

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Respectfully submitted,

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